Filed 9/22/16 P. v. Deutsch CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JANICE SUSAN DEUTSCH, Defendant and Appellant.	E061410 (Super.Ct.No. SWF1201858) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

James M. Crawford; and John L. Staley under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

By the time defendant Janice Susan Deutsch brought her 86-year-old mother to a hospital, her mother was suffering from bedsores, joint contractures, malnutrition,

dehydration, and a severe sunburn. Her clothing stank of urine and feces. Her condition indicated that she had been left lying outdoors in the same position "for an extended period of time." Defendant admitted that she was her mother's caretaker but claimed that her mother had refused to go to a hospital.

A jury found defendant guilty of criminal elder abuse (Pen. Code, § 368, subd. (b)(1)), with an enhancement for personally inflicting great bodily injury on an elder (Pen. Code, § 12022.7, subd. (c)). Defendant was sentenced to a total of seven years in prison, along with the usual fines, fees, and directives.

In this appeal,[1] defendant contends that:

1. There was insufficient evidence of the personal infliction element of the great bodily injury enhancement.

2. The trial court erred by excluding evidence that defendant's mother refused medical treatment on a subsequent occasion.

3. The admission of defendant's mother's statements to the police violated defendant's confrontation rights.

4. There was insufficient evidence to support giving CALCRIM No. 361 ("Failure to Explain or Deny Adverse Testimony").

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[1] Defendant has also filed a related petition for writ of habeas corpus (case No. E062994). We ordered the writ petition considered with (but not consolidated with) this appeal for the purpose of determining whether an order to show cause should issue. We will rule on the petition by separate order.

5. Defendant's posttrial counsel rendered ineffective assistance because he failed to read the trial transcripts.

We find no prejudicial error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *Defendant's Mother's Admission to the Hospital*.

Defendant lived with her mother Jane Doe[2] in a rural area near Wildomar.

On Sunday, September 30, 2012, defendant brought her mother to a hospital emergency room in Mission Viejo. Her mother was 86 years old at the time. Defendant said her mother had fallen about 12 days earlier; her mental status had started to deteriorate about four days earlier.

Defendant's mother was "obtunded," meaning "very unresponsive." Her clothing was filthy.She smelled of urine and feces. She had feces under her fingernails.

She had a severe sunburn.[3] Dr. Robert Goldberg found severe "desquamation" — i.e., peeling skin — presumably due to the sunburn. There was a layer of dead skin "through her entire body." When her clothing was removed, her skin came off with it.

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[2] The trial court ordered that defendant's mother be referred to by this fictitious name. (See Pen. Code, § 293.5.)

[3] A nurse described the burn as "not a normal sunburn" and as "deep, co[a]rse wounds." However, she also described it as "markings that were linear on the back side." Thus, she seems to have been referring to the bedsores (see *post*), which can present as redness or blanching, not the sunburn.

Likewise, sheets would stick to her skin; when they were removed, her skin would come off. Her lips were very chapped and even blistered. In Dr. Goldberg's opinion, the sunburn indicated "extended exposure."

Defendant's mother also had "multiple stage 2 and stage 3 bedsores" on her back, her buttocks, and the back of her legs. The stage 3 bedsores were open and weeping. This meant that she had been left in one position "for an extended period of time." The shape and spacing of the bedsores were consistent with the straps of a chaise lounge.

In addition, defendant's mother had contractures of both knees and one arm joint. Dr. Goldberg explained that "if you leave a joint unmoved for an extended period of time, eventually the muscle and ligaments will scar up so that you can't move them." Like the bedsores, the contractures indicated that she had been "left immobile for [an] extended period[] of time."

Finally, defendant's mother was severely malnourished and dehydrated. She was starting to metabolize her own tissues; she had visible muscle wasting. The dehydration was impairing her kidney function. If left untreated, this could cause death.

B. *Defendant's Statements to the Police.*

When the police interviewed defendant, she admitted that she was her mother's caretaker.

She told them that her mother had fallen a week and a half or two weeks earlier. During the first week, she sat up in bed. During the second week, however, she insisted on lying on a vinyl chaise lounge.

Defendant said that her mother went outside every day. Defendant and a handyman named Miguel would pick up the chaise lounge and "move her back and forth." At one point, defendant said that her mother was outside from 5:00 to 8:00 p.m., after "the heat of the day." However, she also said that she was outside "[i]n the mornings." Defendant admitted that Miguel was not there every day.

According to defendant, her mother's appetite was "not normal," but she did eat turkey, ice cream, and yogurt and drink through a straw. She would urinate and defecate through the "slats" of the chaise lounge. Defendant would hose her mother off.

Defendant claimed that her mother did not want to go to a hospital. "She just says every day give me another day." On Saturday, however, defendant told her mother, "[T]his isn't working." Defendant said she had to go to a hospital, and she agreed.

The police pressed defendant about the urine and feces on her mother's clothing. Eventually, she said that, on the way to the hospital, her mother had "peed in the car." Her mother was hungry, so they stopped at an In-n-Out Burger and got her a burger and a milkshake. As a result, her mother "was in the car for a while."

C. *Defendant's Testimony at Trial*.

Defendant's testimony was largely consistent with her statement to the police, with the following significant differences and additions.

Defendant testified that she had no experience in caring for the elderly.

When her mother first took to the chaise lounge, defendant was concerned that she might have a fracture.

She testified that she put a bucket under the chaise lounge. She washed her mother twice a day, using a portable hot-water washer designed for horses. She changed her mother's clothing every day. At night, she and Miguel brought her back in the house and "rolled" her onto a futon.

Defendant admitted that she should have put sunscreen on her mother.

By Wednesday, defendant noticed the contractures. She volunteered that it was a "bad decision" not to take her mother to the hospital at that point. By Thursday, she noticed the bedsores; she put antibiotic cream on them and wrapped them in bandages. On Friday, she decided to "give her [mother] the weekend. If she wasn't better, then she had to go in." By Saturday, she noticed that her mother was not drinking as much. On Sunday, defendant's mother finally agreed to go to the hospital.

After the stop at In-n-Out, defendant's mother defecated in the car; defendant did not have a chance to clean her up before they got to the hospital.

Defendant concluded, "I . . . made horrible decisions that week. I think my decisions were completely bad. I mean, there was no good decisions made that week. I think all of the decisions were poor and poorly thought out and terribly executed."

D. *Testimony of Friends of the Family*.

Norman Lindsay as a friend of defendant and her mother. According to Lindsay, defendant's mother was "a very independent, strong-willed woman" who "liked to be left alone." "[S]he liked to be outside a lot."

Lindsay testified that, before September 2012, defendant's mother could walk with a walker, and could cook, bathe, and dress herself.

On Wednesday, September 26, 2012, however, in a phone call, defendant told Lindsay that her mother was not feeling well and was not eating solid food. Lindsay spoke to defendant's mother and told her, "[I]f you don't eat, you're going to wind up in the hospital." She responded, "Leave me alone."

Lindsay told defendant, "[I]f your mother doesn't take care of herself, you're going to have to do something." Defendant said that during the day, she put her mother in the chaise lounge outside on the patio, in the shade, and at night she brought her back in and put her to bed.

On Friday, defendant told Lindsay her mother was not eating and she should "probably" take her to the hospital.

On Saturday, defendant asked Lindsay to help her take her mother to the hospital, but he could not do it until the following day. He warned her, "[I]f [your] mother is in really bad shape, you're going to have to call . . . 911." Defendant replied, "She's refusing to go to the hospital." Lindsay said, "It's on you. You're going to have to do what you have to do."

On Sunday, defendant asked Lindsay again to help take her mother to the hospital. When he arrived, he found defendant's mother lying outside in a chaise lounge, with a

sheet over her, in the shade of a bush, asleep. "She looked a little unkempt."[4] "[S]he had a little bit of a sunburn on her face." He did not notice any peeling skin or sores.

Lindsay claimed that he woke her up and told her she was going to the hospital. She said, "No, you're not taking me there." She said that her husband had gone to the hospital and had never come back. On the way to the hospital, defendant's mother ate a milkshake and half a burger,[5] then defecated.

Duff Shidaker testified that he had dinner with defendant and her mother at a restaurant a week or 10 days before she was admitted to the hospital. At that time, defendant's mother was able to walk with a cane. She liked to be outside and she enjoyed being around her dogs, sheep, and goats. She once told Shidaker that she did not want to go to a hospital.

II

THE SUFFICIENCY OF THE EVIDENCE THAT DEFENDANT PERSONALLY INFLICTED GREAT BODILY INJURY

Defendant contends that there was insufficient evidence of the personal infliction element of the great bodily injury enhancement.

"""We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in

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[4] Lindsay told police "she looked like hell."

[5] In Dr. Goldberg's opinion, this was "very unlikely"; he would be "very surprised" if defendant's mother was able to eat anything without choking on it.

support of the judgment the trier of fact could have reasonably deduced from the evidence." [Citation.]' [Citation.] 'The question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the underlying enhancement beyond a reasonable doubt.' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1197.)

The challenged enhancement applies to "[a]ny person who personally inflicts great bodily injury on a person who is 70 years of age or older, other than an accomplice, in the commission of a felony or attempted felony . . . ." (Pen. Code, § 12022.7, subd. (c).)

"[T]he enhancement applies only to a person who himself inflicts the injury." (*People v. Cole* (1982) 31 Cal.3d 568, 572.) "'[T]he meaning of the statutory requirement that the defendant *personally inflict* the injury does not differ from its nonlegal meaning. Commonly understood, the phrase "personally inflicts" means that someone "in person" [citation], that is, directly and not through an intermediary, "cause[s] something (damaging or painful) to be endured" [citation].' [Citation.]" (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1184.)

People v. Warwick (2010) 182 Cal.App.4th 788 is practically on point. There, the 18-year-old defendant gave birth in her bedroom; she left the baby on the bed, uncovered except for a blanket on his forehead, for five or six hours. When her mother came to the door, the defendant said she was "tired." The baby suffered hypothermia, which brought him close to death. (*Id*. at pp. 790-792.) The defendant was convicted of child abuse, with an enhancement for personally inflicting great bodily injury. (*Id*. at p. 792.)

On appeal, the defendant argued "that the meaning of 'personally inflicts' requires a 'personal and direct application of force. It does not mean injuries that are the result of a passive failure to act.'" (*People v. Warwick, supra*, 182 Cal.App.4th at p. 793.) The appellate court disagreed. It held that the enhancement does not necessarily require the application of physical force to the victim. (*Id*. at p. 794.) It also held that personal infliction does not require taking affirmative action; it could include "the failure to act where action is required." (*Id*. at p. 795.)

The court concluded: "[E]ven if we accepted defendant's view, she did take 'affirmative action,' albeit actions that were direct and ineffectual — defendant's actions after her child's birth directly caused his injuries, including only partially covering him with a blanket rather than properly swaddling him. This led directly to his hypothermia and nearly caused his death. Effectively sending her mother away from the door was also affirmative action that kept the baby from getting help for several hours. Under either definition, defendant 'personally inflicted' great bodily injury on her child." (*People v. Warwick, supra,* 182 Cal.App.4th at p. 795.)

Here, the jury could find that defendant was the "but for" cause of her mother's injuries. She did not cause them through an aider and abettor or other intermediary. Under *Warwick*, she personally inflicted her mother's injuries by failing to act where action was required. As she admitted, and as the jury found, she had the care and custody of her mother; nevertheless, she failed to take action to prevent her mother's bedsores, contractures, malnutrition, dehydration, and sunburn.

Defendant discusses *Warwick* as if it required affirmative action. Not so. It specifically held that affirmative action is not required (although it also held, as an alternative ground, that the defendant did take affirmative action).[6]

Defendant also argues that her mother caused her own injuries by refusing to go to the hospital. Defendant, however, was her mother's caretaker and had the ability to take her to the hospital. Defendant admitted that it was a "bad decision" not to take her mother to the hospital on Wednesday, implying that she could have taken her. Likewise, on Friday, she decided to wait through the weekend, implying that she could have taken her to the hospital right away. In any event, the injuries did not occur because defendant's mother did not go to the hospital; she needed to go to the hospital because the injuries had already occurred. If defendant had properly sheltered, fed, and tended to her mother, her mother would not have been injured.

III

THE EXCLUSION OF EVIDENCE THAT

DEFENDANT'S MOTHER REFUSED MEDICAL TREATMENT

Defendant contends that the trial court erred by excluding evidence of an instance in which defendant's mother refused medical treatment.

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6 Defendant did take affirmative action to cause her mother's sunburn, by placing her outside in the sun without any protection. However, it is not at all clear that the sunburn, standing alone, would constitute great bodily injury.

A. *Additional Factual and Procedural Background*.

Defense counsel called witness Linda Thompson. Thompson testified that, one day in January 2014, she had visited defendant's mother at "the place [where] she was"[7] and learned that she had pneumonia.

Defense counsel asked, "[W]as [defendant's mother] refusing medical care at this time?" The prosecutor objected, "Relevance." Defense counsel argued that the evidence was relevant to show defendant's mother's "steadfast and continued reluctance to receive medical care . . . ."

The trial court stated, "You already have rock solid testimony from Mr. Lindsay and from your client that . . . the alleged victim in this case refused medical care, refused to go to the hospital. It's uncontroverted."

Defense counsel then argued that the evidence was not cumulative. The trial court responded, "I didn't say it was cumulative, I'm saying what happened in January of 2014, . . . one month and a few weeks ago,[8] I don't see that as being relevant at all."

It concluded: "I think you have uncontroverted testimony about the alleged victim's reluctance and/or refusal to go to a hospital and/or to receive medical care, and so I don't believe it's relevant. It's something that happened a month ago, and that is . . . a couple years post incident."

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[7] Ever since being discharged from the hospital, defendant's mother had been in a nursing home.

[8] The trial took place in February and March 2014.

B. *Discussion.*

We may assume, without deciding, that the trial court erred. Even if so, the error was harmless.

Defendant claims that the asserted error violated her right to due process under the Fifth Amendment as well as her right to present a defense under the Sixth Amendment. Not so. "'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' [Citation.] Because the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under *People v. Watson* [(1956)] 46 Cal.2d [818] . . . . [Citation.]" (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.)

Under this standard, an error is harmless unless it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

As already discussed (see part II, *ante*), the fact that defendant's mother refused to go to the hospital fell short of showing that defendant was not *able* to take her mother to the hospital. Admittedly, the fact was also relevant to whether defendant acted with criminal negligence. (See *People v. Medlin* (2009) 178 Cal.App.4th 1092, 1102.) However, defendant's testimony that her mother refused to go to the hospital was already corroborated by both Lindsay and Shidaker. The excluded evidence related to a refusal of medical care, not a refusal to go to a hospital nor any supposed fear of hospitals;

defendant's mother was already in a nursing home. Finally, there was ample evidence that defendant was criminally negligent — not least, her admission that she made "no good decisions."

Thus, we conclude that there was no reasonable probability that, even if the evidence had been admitted, the outcome would have been any more favorable for defendant.

IV

THE ADMISSION OF DEFENDANT'S MOTHER'S STATEMENTS TO THE POLICE

Defendant contends that the admission of her mother's interview with the police violated her confrontation rights.

A. *Additional Factual and Procedural Background*.

In their trial brief, the People moved in limine to admit the interview. They argued that it was admissible under the state of mind exception to the hearsay rule. (Evid. Code, §§ 1250-1252.) They also argued that its admission would not violate the confrontation clause because it was not testimonial.

At the hearing on motions in limine, defense counsel objected to the interview on the ground that he had subpoenaed defendant's mother and she was available to testify. The prosecutor disagreed, asserting that she was unavailable. The trial court therefore set

a hearing pursuant to Evidence Code section 402 (section 402) with regard to her availability.[9]

Meanwhile, defense counsel also objected to the interview on the ground that "we were never there to query [defendant's mother] during that time of the video."

After holding the section 402 hearing, the trial court returned to the admissibility of the interview. It opined that the interview was admissible under the state of mind exception. It then asked defense counsel:

"THE COURT: . . . Can you express to me the reason why you're objecting to the playing of this to the jury solely for the purpose of showing what her state of mind was at the time?

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[9] The parties were never very clear about precisely how the availability or unavailability of defendant's mother related to the admissibility of her interview.

For purposes of the state of mind exception, availability was irrelevant. (See Evid. Code, §§ 1250-1251.)

For purposes of the confrontation clause, however, if defendant's mother was available and testified at trial, the interview would clearly be admissible. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9; *People v. Riccardi* (2012) 54 Cal.4th 758, 801, fn. 21.) Thus, defense counsel's *objection* on the ground that he intended to call defendant's mother was both confused and confusing.

After the trial court had already set a section 402 hearing, the prosecutor belatedly noted that defendant's mother's availability was irrelevant to the admissibility of the interview; however, it was relevant to whether the defense could call her. Thus, in his view (although he did not put it this way), the real issue at the section 402 hearing was whether to quash the supposed subpoena to defendant's mother.

Ultimately, defense counsel did not call defendant's mother, and the trial court never ruled on whether she was available.

"[DEFENSE COUNSEL]: We can proceed with it.

"THE COURT: All right. Is that acceptable to you?

"[DEFENSE COUNSEL]: Yes."

Accordingly, a video of the interview was played for the jury.

In it, defendant's mother displayed dementia. She said that she was 37 years old, defendant was 17 years old, her husband had died in 1908, and her husband still lived with her. She claimed that the interview was taking place in the living room of her own home. She said nothing but good things about defendant. For example, she said that defendant was a "[w]onderful daughter." "[S]he takes care of me. Gets my food." "I love her and she loves me." "We're inseparable." She denied any neglect.

The trial court instructed the jury:

"[T]he tape that you just viewed and heard is being presented not for the truth of what is stated therein. Let me repeat that. It's not being presented for the truth of what is stated therein, it's being shown to demonstrate the state of mind of [defendant's mother] on October 26th, 2012. That's the only person [*sic*] it's being shown for."

B. *Discussion.*

1. *Forfeiture.*

Defense counsel forfeited any contention that the admission of the interview violated the confrontation clause. Arguably, his statement that "we were never there to query [defendant's mother] during that time of the video" could be viewed as a confrontation clause objection. But even if so, once the trial court ruled that the

interview was admissible under the state of mind exception and asked if he had any further objection, defense counsel indicated that he did not. Thus, to the extent that he had previously made a confrontation clause objection at all, he withdrew it at that point. This constituted a forfeiture. (Evid. Code, § 353; see *In re Estate of Odian* (2006) 145 Cal.App.4th 152, 167-168 [Fourth Dist., Div. Two] [motion in limine that counsel withdrew before the trial court ruled on it failed to preserve objection].)

2. *Merits*.

Separately and alternatively, we also reject this contention on the merits. Defendant's mother's statements were testimonial because the primary purpose of the interview was to investigate a past crime for future prosecution; it was not to meet some ongoing emergency. (See *Davis v. Washington* (2006) 547 U.S. 813, 822.)

However, "[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]" (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59, fn. 9.)

It could be argued that the statements here were not being offered for their truth; for example, the prosecution was not trying to prove that defendant was actually 17 years old. It was trying to prove that defendant's mother had dementia. (See 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 39, p. 832 ["obviously irrational or delusive statements" are not offered to prove their truth when "offered to prove the incompetency of the declarant"].)

On the other hand, it could be argued that they were being offered for the truth of the *implied* assertion that defendant's mother *actually believed* that defendant was 17 years old. Defendant's mother's statements were relevant if, but only if, she was telling the truth. If she was lying — for example, if she was feigning dementia to avoid having to testify against her daughter — then the statements would be irrelevant. This reasoning tends to show that the statements were offered for their truth. (Cf. 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 38, p. 831 ["If an utterance, *regardless of its truth or falsity*, justifies an inference concerning the declarant's mental state . . . , it may be admissible as circumstantial evidence of that mental state."], italics added.) Moreover, the trial court implicitly admitted them for their truth by admitting them under the state of mind exception.

Because we have not found any controlling case law on this issue, we choose not to decide it. Instead, we will assume, without deciding, that the statements were admitted for their truth, and hence their admission violated the confrontation clause.

Even if so, we are confident, beyond a reasonable doubt, that the error did not contribute to the verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant's mother's statements in the interview were exculpatory, not incriminating. The fact that defendant's mother was not in her right mind was largely cumulative of the evidence that, when she arrived at the hospital, she was unresponsive and "obtunded."

Defendant's *only* argument as to why the evidence was prejudicial is that "[a]dmission of the interview of this witness served as a basis for one count of elder

abuse with great bodily injury upon Doe." That is tantamount saying any evidence introduced by the prosecution is prejudicial by definition. But that is not the law.

We therefore conclude that the error, if any, was harmless.

V

INSTRUCTION ON FAILURE TO EXPLAIN OR DENY ADVERSE TESTIMONY

Defendant contends that the trial court erred by instructing the jury with CALCRIM No. 361 ("Failure to Explain or Deny Adverse Testimony").

A. *Additional Factual and Procedural Background*.

The trial court instructed:

"If the defendant failed in her testimony to explain or deny evidence against her, and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt.

"If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." (CALCRIM No. 361.)

B. *Discussion*.

Defendant argues that the instruction was unwarranted because she did not fail to deny any evidence against her.

Preliminarily, the People respond that defendant's trial counsel forfeited this contention by failing to object to the instruction. *People v. Vega* (2015) 236 Cal.App.4th

484, a case dealing specifically with CALCRIM No. 361, rejected an identical contention. (*Id*. at p. 495.) As the court explained: "Generally, failure to object does not waive an instructional error on appeal if the instruction was an incorrect statement of law or the defendant's substantial rights were affected. [Citations.]" (*Ibid*.) Hence, we turn to the merits.

"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citation.]" (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) Thus, it is improper to give CALCRIM No. 361 unless there is some incriminating evidence that the defendant failed to explain or deny. (*People v. Saddler* (1979) 24 Cal.3d 671, 681-682 [dealing with CALJIC No. 2.62, the predecessor of CALCRIM No. 361].)

The People concede that defendant did not fail to explain or deny any incriminating evidence, and therefore the trial court erred by giving CALCRIM No. 361. They argue, however, that the error was harmless.

We agree. The instruction itself stated that it applied only "[*i*]*f* the defendant failed in her testimony to explain or deny evidence against her . . . ." (Italics added.) The trial court further instructed the jury: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find

them." (CALCRIM No. 200.) Thus, if, as the People concede, defendant did not fail to explain or deny any incriminating evidence, we can safely conclude that CALCRIM No. 361 had no effect on the jury's deliberations.

VI

INEFFECTIVE ASSISTANCE OF POSTTRIAL COUNSEL

Defendant contends that her posttrial counsel rendered ineffective assistance in presenting her motion for new trial, because he failed to read the trial transcripts.

A. *Additional Factual and Procedural Background.*

In the wake of the jury verdict, defendant substituted a new privately retained attorney. He filed a motion for new trial asserting that defendant's trial counsel had rendered ineffective assistance.

During the hearing on the motion, there was this exchange:

"THE COURT: . . . Have you read the trial transcripts?

"[POSTTRIAL COUNSEL]: I've not read the entirety of it. I have — I've been somewhat limited in that. I've read [defendant]'s testimony."

The trial court denied the motion.

B. *Discussion.*

"'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have

been more favorable to the defendant.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.)

Defendant does not even claim that the asserted ineffective assistance was prejudicial. She never attempts to explain how the new trial motion would have been more successful if posttrial counsel had read the trial transcript.

Instead, defendant argues that she is entitled to a presumption of prejudice under *United States v. Cronic* (1984) 466 U.S. 648. *Cronic* held that there is a presumption of prejudice "if the accused is denied counsel at a critical stage of his trial" or if counsel is present but "entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." (*Id.* at p. 659.) By contrast, the defendant must show prejudice if his "argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." (*Bell v. Cone* (2002) 535 U.S. 685, 697.)

Here, the new trial motion gave numerous specific examples of asserted ineffective assistance. Some of them related to counsel's interactions with defendant outside the courtroom. For example, according to the motion, one of defendant's trial attorneys told defendant that he was not getting paid enough to interview witnesses and advised her to interview them herself. Others related to counsel's performance in court. For example, the motion noted that defendant's two trial attorneys gave two separate closing arguments, which assertedly conflicted with each other. Thus, it is apparent that, even without having read the entire trial transcript, posttrial counsel was able to mount a

meaningful attack on the assistance of trial counsel. Certainly we cannot say this level of assistance was so trifling as to be the equivalent of no posttrial counsel at all.

In sum, then, defendant is not entitled to a presumption of prejudice and has not affirmatively shown prejudice.

VII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.